



Hamilton County

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County Administrator

Christian Sigman
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March 20, 2013

Milton Dohoney
City Manager
City of Cincinnati
801 Plum Street
Cincinnati, Ohio 45202

Milton:

This letter is in response to the communication sent from City Solicitor John Curp to City Council on March 7, 2013 concerning the oversight of County Sewer District #1 (renamed the Metropolitan Sewer District in 1968). First and foremost, I agree with and appreciate the Solicitor's closing assessment that the Administrations of both the County and City should work together to frame the 1968/2018 discussion for our respective policy bodies. As we have discussed on several occasions, the County stands ready to begin these discussions recognizing that timing is of the essence. In fact, we already had a meeting scheduled with you for March 25 before the Solicitor's memo was sent to City Council.

Aside from the Solicitor's closing remarks, however, the County disagrees with much of the content of the letter. Additionally, significant elements of fact have been neglected which, given the public nature of the correspondence, require formal response. I also find the comments referencing bond ratings and consent decree milestones troubling given their timing and the sensitive nature of these subjects.

The County's objections to the information contained in the Solicitor's letter will be articulated in the form of three responses. The first is a legal analysis refuting the overly simplistic interpretation of the 1968 agreement (Attachment A). I might note, as it bears repeating, that the City's management functions are "subject to the exclusive control and direction of the Commissioners" (Section II, "Purpose of Agreement"). The second response is from the County Board (Attachment B) concerning the fiduciary and governance responsibilities for the District. The third response is this letter focusing on management oversight.

As the chief administrative officers of our respective entities we manage and oversee our departments to ensure results are delivered efficiently. Unique to the County / City relationship concerning the District is that there is a City department head managing a public service that is subject to policies and oversight of another jurisdiction. The County's actions establishing oversight of the City's operation of District are

consistent with the expected role of any executive body ultimately responsible for results (e.g., the Hamilton County Commission). All of the County's oversight activities and associated costs are consistent with not only its authority provided under the 1968 agreement, but are prudent management activities. These activities include legal representation in the federal consent decree litigation, financial management of the County's budget approval authority and debt management, accounting oversight and engineering analyses to help the Board interpret operational decisions in light of its responsibilities under the 1968 agreement.

When we meet on March 25, I will provide a brief list of the significant contributions the County's contract monitor has made in the past two years (despite the occasional less than "unfettered access" promised by MSD leadership). These contributions have provided the Commission with significant levels of additional information and insight beyond that provided by the City and its employees. This has enabled the County to conduct ongoing discussions with City staff to attempt to limit total ratepayer impacts. Given these results, I do not think a reasonable person would agree with the assertion that the monitor's work is duplicative of the MSD management team or, quite frankly, any City oversight of MSD. The County's oversight function is entirely consistent with the Board's significant fiduciary responsibilities including:

- Setting rates and charges for the District;
- Issuing debt to finance the capital program of the District;
- Approving and monitoring the operating and capital budgets of the District;
- Ensuring compliance with the Consent Decrees (as the lead defendant and "principal" of MSD) as well as the named on all permits and licenses issued for the operation of the District; and
- Establishing policy direction for the District, including its rules and regulations.

I freely acknowledge that my management team does not have the necessary major public utility experience to provide the level of monitoring and reporting that the contract monitor provides to the County. I do envision developing some in-house capacity to provide ongoing oversight of the District, but there will always be the occasional need to review the department in-depth by subject matter experts.

The monitor's contributions and efforts are not intended to diminish the work of City employees operating the District, but the monitor's efforts demonstrate that each party plays a unique and important role in this County / City relationship. The County respects the City's role as sole operator. Until such time, however, as the County's monitoring efforts reveal the absence of issues posing risk to the Board's fiduciary responsibility, the County will continue to operate its oversight function and will do so in the most efficient manner possible.

There are many areas of MSD management that the County Board or the County Administration does not get involved in including facility management, planning, information technology, etc. The County does not manage or approve the MSD strategic plan or any annual business plans if these exist. The County does not dictate the standards for office space, vehicles or travel / training.

Specific to human capital management, the County does not get involved in compensation policies, employee benefits, labor negotiations, employee development, talent acquisition, workers' compensation claims management, succession planning, etc. The County does not get involved in specific personnel actions including hiring or employee misconduct (i.e., the Diana Frye incident).

However, to the extent any of these "management" functions jeopardizes the ability to meet our fiduciary responsibilities, as the owner of the District, the County will exert its oversight authority. An emerging issue that would fall into this realm is the City's underfunded pension system. At present, 13% of the City work force is associated with operating the District for 800,000 county residents. As you know, the City has \$700+ million in unfunded pension fund liability. I am certain the Commission does not expect County-wide residents and businesses to pay for the City's pension problems. Another example is the local hiring ordinance approved by the City Council. This ordinance, which is not within the City Council's authority to approve, has the potential to increase the cost of capital projects across a \$3 billion capital program. Finally, the County is increasingly concerned that MSD has not developed adequate internal project management capacity – rather than relying on consultants and contract employees – to manage as well as execute the long-term, significant requirements of the federal consent decree.

Upcoming Debt Issuance

The County and City, through MSD, have worked in a cooperative manner over the years to ensure adequate financing of capital programs. The Solicitor's letter asserting that recent actions of the County Commission may negatively impact the District's bond rating is highly irresponsible on its face – given its timing in relation to the pending \$400+ million bond issuance. It is even more irresponsible given the fact that even the most cursory analysis of the Board's actions will reveal that the County, as the governing body of District, is instilling accountability, transparency and cost control from a City department which operates with a high degree of autonomy from City leadership. As such, it is more likely that the financial markets would respond *positively* to the Board's actions and question the *reluctance of the City* to acknowledge opportunities to improve management, save money, and engage in productive discussion around these issues. As an example, numerous water and sewer districts around the Country have conducted performance audits to improve the utility's performance and resulting rates.


Regulator Review of the LM CPR Submission

In reference to the Solicitor's comment that various County actions "soon may affect the ability to comply with Consent Decree milestones," the only Board actions pertain to those instances where MSD is seeking to advance projects which have yet to receive regulator approval (i.e. MSD has attempted to advance individual projects relating to the LM CPR and/or SSO 700 which have yet to receive formal approval). The Board is also holding MSD's project recommendations that are deficient from an information perspective (e.g., MSD recently attempted to advance a residential demolition project without adequate cost from its own internal cost estimating group). Under no circumstances will the County authorize projects unless these types of basic tenets have been met. The County is lead defendant on the federal consent decree and is fully aware of the milestone requirements. We currently have no indication that any milestone is in danger of being jeopardized. It is troubling that the Solicitor's letter would interject doubt to milestone achievement without any context.

In closing, you and I have worked very well together and I typically would not respond in such a formal manner; but the City Solicitor's correspondence to the City Council, given the information it contained, was wrong on many levels.

I do personally look forward to working with you and your management team to develop constructive options for advancing past this issue and the 2018 deadline imposed by the 1968 Agreement. I would,

again, agree with the Solicitor that these discussions are best initiated through our respective offices and that an administrative, not legal, solution is the most desirable way to productively advance this issue.



Christian Sigman
County Administrator

CC: John Curp, City Solicitor
Cincinnati City Council
Joseph Deters, County Prosecutor
Board of County Commissioners

ATTACHMENT A



JOSEPH T. DETERS
HAMILTON COUNTY PROSECUTING ATTORNEY

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March 20, 2013

John P. Curp
City Solicitor
801 Plum Street
Cincinnati, Ohio 45202

Re: March 7, 2013 Memorandum: Management and Operation of the Hamilton County Sewer District No. 1 (MSD) under the 1968 Agreement and the Federal Consent Decrees

Dear John:

We have reviewed the memorandum dated March 7, 2013 sent from you to the Mayor and Members of Council which was discussed at the March 11, 2013 Council meeting. Portions of that memorandum need to be addressed so as to accurately set forth both the facts and law applicable to the 1968 Agreement in which the City consented to be a part of Hamilton County Sewer District No. 1 pursuant to the provisions of R.C. 6117.03.

Sewer Districts were established in the County starting in 1924 and included portions of the City of Cincinnati in the County Sewer District as early as 1926. The 1968 Agreement informs the history of Hamilton County Sewer District No. 1, which was formed by the Board of County Commissioners in 1955. During the next eight years, the Board of County Commissioners completed the consolidation of previously established sewer districts and included the other unincorporated areas of Hamilton County into Hamilton County Sewer District No. 1. It was not until 1968 that the City of Cincinnati consented to have all of the City included within Hamilton County Sewer District No. 1. On April 10, 1968, the Board of County Commissioners adopted a resolution changing the official name of the Hamilton County Sewer District No. 1 to the Metropolitan Sewer District of Greater Cincinnati. However, this change in name did not change the fact that MSD is a County Sewer District created pursuant to the provisions of R.C. Chapter 6117. Therefore, it is evident that Hamilton County Sewer District No. 1, created pursuant to R.C. Chapter 6117, existed prior to and independent of the City of Cincinnati.

The City consented to the County's authority over the Sewer District when it entered into the 1968 Agreement. Section II, Purpose of the Agreement, states "[i]n entering into this Agreement, it is the intent of the Commissioners to constitute the City as the sole management agency for the operation and maintenance of the sewer system, *subject to the exclusive control and direction of the Commissioners as provided herein.*" (Emphasis added.) Section IV states that "[a]s provided by Sections 6117.01 and 133.06, ORC, authority and control of the sewer system of the sewer district shall remain vested in the Commissioners including, but not limited to, the major responsibilities of fixing sewerage charges, adopting Rules and Regulations and approving capital improvement programs, and undertaking the necessary legislation therefor." In addition, the City consented to Section IX.8, which states "[a]t its discretion, the Commissioners may employ an independent accounting firm for an audit of the accounts of the district. . ." In turn, the County consented to the City's management and operation of MSD in an efficient and businesslike manner and to perform the functions set forth in Section VIII.

The City also signed the Global Consent Decree and the Interim Partial Consent Decree ("Consent Decrees") which were approved by the U.S. District Court for the Southern District of Ohio and define the roles and responsibilities of the City and the County. Section II of the Global Consent Decree states, in part, as follows:

The County is the holder of various NPDES permits that govern discharges from the County's Wastewater Treatment Plants and Sewer System. As such, it is responsible for operating the County's Wastewater Treatment Plants and Sewer System. The County has established the MSD, a county sewer district established pursuant to Chapter 6117 of the Ohio Revised Code, and acts as the principle of MSD, including maintenance of funding authority for MSD.

Pursuant to an agreement with the County, and subject to the pertinent provisions of the Ohio Revised Code, the City also serves as the agent of the County in the management and operation of MSD.

United States v. Board of County Commissioners, 1-02-107 (S.D. Ohio June 9, 2004).

The need for County oversight of MSD is apparent from the fact that we are now operating under two federal Consent Decrees. The County understands our obligations under the Consent Decrees and the importance of compliance therewith due to the significant financial consequences for the ratepayers including potential penalties. While many of the upcoming Consent Decree projects will take place in the City of Cincinnati, the County is cognizant of the interests of all MSD ratepayers - some of whom will be impacted directly by projects and all of whom will be burdened with the cost.

The County's role in the Consent Decree litigation and under the 1968 Agreement is to set policy for MSD in accordance with applicable law. The Ohio Revised Code governs which laws, rules, and procedures apply to purchases made by MSD. The Board's authority to contract with the City to operate and manage MSD is found in R.C. 307.15 which authorizes the County to contract with the City to exercise any power, perform any function, or render any service on behalf of the County that the County may exercise, perform or render. The principle is simple. The County cannot grant powers it does not have. The County does not have Charter powers. It

has only those powers specifically granted or necessarily implied by statute. Quite simply put, the City is the County for purposes of the authority granted it by the 1968 Agreement. The fact that the City has a Charter is irrelevant. The City may exercise the authority the County does have regarding MSD as set forth in and/or limited by the 1968 Agreement. Since the County has not authorized and does not have the authority to authorize, the City to use its own procurement rules, MSD must procure using the Ohio Revised Code sections applicable to the County.

The Ohio Attorney General reached the same conclusion in 1991 in an opinion letter to the Ohio Auditor of State. It states:

Pursuant to R.C. 307.15, a municipal legislative authority that enters into a contract with a board of county commissioners to manage and operate a county sewer district established under R.C. Chapter 6117 must exercise the specific powers and duties that pertain thereto in accordance with the terms of such statutory provisions as apply to the exercise of those powers and duties by the board of county commissioners. In such circumstance the award of contracts by the municipal legislative authority for capital improvement, assessment, and maintenance and repair projects of the county sewer district must comply with the pertinent competitive bidding procedures and requirements set forth in R.C. Chapter 153, R.C. 307.86-.92, and R.C. 6117.27 as would apply to the award of such contracts by the board of county commissioners.

1991 Ohio Op. Att'y Gen. No. 91-012 (Mar. 11, 1991).

The Opinion of the Ohio Attorney General was written in response to an audit finding involving the City of Cincinnati and its contracting policies in the operation of MSD within Hamilton County. This Opinion is not a theoretical application to the City of Cincinnati and Hamilton County.

Consistent with the County's authority to issue rules and regulations for MSD procurement, Section 2401 provides that MSD is permitted to procure pursuant to the County's procurement policy. The BOCC Resolution of January 16, 2013 further clarified the County's procurement policy for MSD. This Resolution did not merely express the Board's disapproval, but specifically directed MSD not to implement the City's responsible bidder and local preference ordinances. Yet, despite the Board's clear direction, MSD continues to bid construction projects using the City's procurement policies.

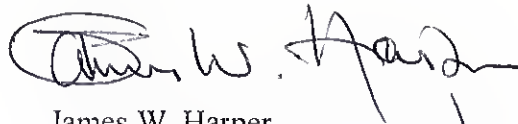
Not only do the City's recently enacted policies conflict with County procurement policy, the policies are illegal. The U.S. District Court for the Southern District of Ohio recently stated that there is fairly convincing evidence that Chapter 318 violates the Privileges and Immunities Clause of the United States Constitution and that Chapter 320 of the policy is preempted by ERISA. *Rack & Ballauer Excavating Co., Inc. v. City of Cincinnati*, 1:13-CV-30, 2013 WL 503129 (S.D. Ohio Feb. 8, 2013). At least one member of Council has recently indicated a belief that City's stated policy is unlawful.

Purchases made in violation of Ohio law and County procurement policy could be viewed as an *ultra vires* action exposing the general fund of the City. Similarly, the City's failure to comply with Board resolutions subject the City to the same exposure.

As you know, and I trust the City leadership has been advised, the City can be held liable directly, through its general fund, for all damages and losses that arise from or are related to the City's operations of MSD which are in violation of the Ohio Revised Code or Board resolutions, as such actions are *ultra vires*. MSD ratepayers will not be responsible for extra procurement costs or supplemental remedial costs when the City has decided to act independent of Ohio law or Board policy resolution.

Paramount to these discussions are the interests of the ratepayers. The City and the County need to work together to provide optimal service and compliance with the Consent Decrees at the best value to the ratepayers. It seems to me that all County ratepayers will be best served if legal counsel for the City and the County discuss both questions of law and fact relating to the 1968 Agreement in order to reach a consensus on some, if not all, issues. Clearly policy issues will remain for attention by our respective clients, but at least the ratepayers will have had the benefit of legal counsels' best efforts.

Very truly yours,

A handwritten signature in black ink, appearing to read "James W. Harper". The signature is fluid and cursive, with a large, stylized "H" and "P".

James W. Harper
Chief Assistant Prosecuting Attorney

ATTACHMENT B



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Board of County Commissioners

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March 20, 2013

Cincinnati City Council
801 Plum Street
Cincinnati, OH 45202-1979

The purpose of our letter today is to respond to the City Solicitor's letter to City Council dated March 7, 2013 concerning the governance of County Sewer District #1 (the former name of Metropolitan Sewer District – MSD prior to 1968). While the County Commission welcomes the opportunity to have our respective Administrations begin the process of determining the future of the District post 2018, the County Commission does not agree with the City Solicitor's interpretation of the 1968 agreement.

The Hamilton County Prosecutor's Office, as legal counsel to the County Commission, will send under a separate cover, a legal analysis refuting the City Solicitor's assertions. The Prosecutor's response is not intended to provoke litigation or contention, only to educate the City Solicitor and other interested parties on the 1968 agreement and the Ohio Revised Code (ORC) that governs a County Sewer District as defined in Section 6117 of the ORC.

The City Solicitor's interpretation of the 1968 agreement suggests that the County Commission assumes all the responsibility and risks of approving budgets, setting rates, issuing debt, holding title to property and permits, etc., while the City operates the utility with no oversight, check or balance. On the contrary, according to the agreement, the City operates the District "subject to the authority vested in the Board of County Commissioners." The County views the agreement from an owner / operator perspective where the City is the operating agent for the County. As such, areas of policy concerning oversight and governance of the County Sewer District fall solely within the realm of the County Commission.

The Solicitor's also letter suggests that the County oversight efforts are duplicative of the MSD's management. The County Commission strongly supports the County Administrator's efforts to establish formal oversight of a \$200 million per year operation that is also charged with executing a \$3-\$5 billion capital program. While we

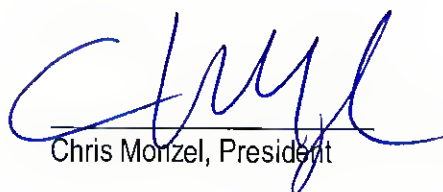
are certain Council shares our concern regarding the impact that rising sewer rates will place upon County residents and businesses, we have seen very little in the way of checks or controls proffered by Council toward the operations of the District. Whether you are aware, or not, the current oversight structure was suggested by the leadership of the Metropolitan Sewer District as the prior Program Management Consultant, CDM, was phased out. The County's increased oversight has already saved tens of millions of dollars on major capital projects, corrected errors in project cost escalators, increased interest earnings on pool cash assets and decreased operating expenses. None of these benefits would have accrued without an effective County oversight function. Contrary to the Solicitor's letter, the oversight efforts of the County are in no way duplicative of the City's functions under the 1968 agreement. Additionally, the Commission's efforts to perform a comprehensive review of the County Sewer District, as it prepares to embark on the largest capital program ever undertaken in our community, should be viewed in the same manner as the recent comprehensive review of the City police department. This type of periodic review is good management.

The operation of the region's sewer utility today is vastly different than when the original agreement was penned and approved by the County and City in the 1960's. While the population shifts from 1970 concerning the ratio of MSD ratepayers in the City versus the County is the most obvious change, the introduction of stringent environmental laws, a federal consent decree, and significant economic challenges for the City have increased the need and importance of effective oversight of the District.

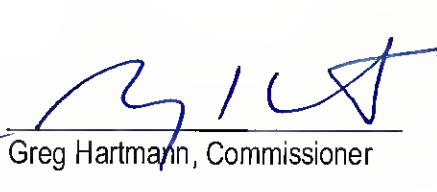
The County Commission welcomes any effort to initiate a discussion long sought by the County to address the pending termination, in 2018, of the 1968 agreement. County Administration met with City Administration on March 15, 2011 in an attempt to begin the dialogue on the future of the 1968 agreement only to be told that no action was likely on this subject until a new Mayor was on board. We do not believe this important discussion can be delayed any longer.

While the Commission will continue its oversight functions for the ratepayers of the District as required under the 1968 agreement, we look forward to the County and City administrative teams beginning a substantive dialogue regarding governance and management of the utility post 2018. Both the County Commission and City Council have a responsibility to the ratepayers to ensure a transparent, fact-based discussion on the future of the District.

Hamilton County Board of Commissioners



Chris Monzel, President



Greg Hartmann, Commissioner



Todd Portune, Commissioner